Implied Consent, Breath and Blood Tests and Other Evidentiary Issues

Darrin M. Dolehanty
OWI: The Sober Truth
IJC Spring Conference
April 19, 2007

Introduction

- Discuss Indiana's Implied Consent Laws
- Examine What Happens If Person Complies
- **Examine What Happens If Person Refuses**
- Explore Methods of Obtaining Sample Without Person's Consent
 - Without a Warrant
 - With a Warrant

- A person who operates a vehicle impliedly consents to submit to the chemical test provisions of this chapter as a condition of operating a vehicle in Indiana
- "Chemical Test" defined at IC 9-13-2-22
- Required if officer has probable cause of offense under IC 9-30-5
- Must be administered within 3 hours
- Must submit to each test offered to comply

Person Agrees to Take Chemical Test

They Could "Pass"

They Could "Fail"

- ✓ Duties of Law Enforcement:
 - ✓ Obtain license or permit
 - ✓ Issue receipt
 - ✓ Submit PC Affidavit to Prosecutor
 - ✓ Send copy of PC Affidavit to BMV

- ✓ Duties of Physician or Assistant
 - **✓** IC 9-30-6-6(a)
 - ✓ Physician or "assistant"
 - ✓ Shall deliver sample or disclose result
 - ✓ To officer who requests as part of criminal investigation
 - ✓ Must obtain sample in medically accepted manner

- ✓ More Duties of Law Enforcement:
 - ✓ Disclose only to prosecutor for use as evidence in a criminal proceeding

- ✓ Admissibility of Breath Test
 - ✓ IC 9-30-6-5(A) requires approval of:
 - ✓ Test Operator
 - ✓ Test Equipment
 - √ Chemicals
 - √ Technique
 - ✓ IC 9-30-6-15(a) makes this evidence admissible

- ✓ Relation Back Presumption
 - ✓ If within 3 hour window
 - √ 0.08 (or more) alcohol result
 - ✓ Trier of fact shall presume at least 0.08 at time of operation of vehicle
 - ✓ Rebuttable

- ✓ More Duties of Law Enforcement
 - **✓** IC 9-30-6-3
 - ✓ Requires arrest if test results in "prima facie evidence of intoxication"
 - **✓** IC 9-13-2-131
 - ✓ Alcohol concentration equivalent to at least 0.08 gram of alcohol per:
 - ✓ 100 ml of blood, or
 - ✓ 210 liters of breath

What Happens if They "Refuse" the Chemical Test?

- ✓ IC 9-30-6-7
 - ✓ Officer must inform that refusal will result in suspension of driving privileges
- ✓ If still refuse after this warning
 - ✓ Obtain license or permit
 - ✓ Issue receipt
 - ✓ Submit PC Affidavit to Prosecutor
 - ✓ Send copy to BMV

What Happens if They "Refuse" the Chemical Test?

- ✓ Officer is not required to advise defendant of more than suspension
 - ✓ Jacks v. State, 853 N.E.2d 520 (Ind.App. 2006)
- ✓ Refusal is admissible into evidence
 - **✓** IC 9-30-6-3(b)
- ✓ Suspension is 1 year
- ✓ Suspension is 2 years if prior conviction

- Applicability
 - Accident involving serious bodily injury
 - Accident involving death
 - Not for PAMD

The Rules

- IC 9-30-7-2
- Person who operates a vehicle impliedly consents to submit to a PBT or chemical test as condition of operating a vehicle in Indiana
- Must submit to each test offered

The Rules

- IC 9-30-7-3
- Officer must offer pbt or chemical test if reason to believe operated a vehicle involved in "fatal accident" or accident with SBI
- "Fatal Accident" defined at IC 9-30-7-1(b)

The Rules

- If PBT shows alcohol
- If no alcohol but officer has PC of controlled substance or drug
- If PBT is refused
- I Then officer must offer a chemical test

The Rules

- Officer may offer more than 1 test
- All chemical tests must be within 3 hour window
- No test required if person is unconscious
- 9-30-6-5 still applies if breath test
- 9-30-6-6 still applies if physician involved

Refusals:

- Class C Infraction and 1 year suspension for refusing PBT or chemical test
- Class A Infraction and 2 year suspension if prior conviction for OWI

Other methods for obtaining sample coming next!

You Are Here!

- Discuss Indiana's Implied Consent Laws
- Examine What Happens If Person Complies
- **Examine What Happens If Person Refuses**
- Explore Methods of Obtaining Sample Without Person's Consent
 - Without a Warrant
 - With a Warrant

- Con Law for Dummies (like me)
 - Fourth Amendment prohibits warrantless searches
 - If no warrant used, State has burden to show exception at time of search
 - PC + Exigent Circumstances is a recognized exception to warrant requirement
 - Destruction of evidence can be an exigent circumstance

- Schmerber v. California, 384 US 757 (1966)
 - Forced blood test is a search
 - Taking blood sample without consent did not violate 4th Amendment if:
 - circumstances justified taking sample
 - sample obtained reasonably
 - PC + inevitable dissipation of alcohol as exigent circumstance

- Abney v. State, 821 N.E.2d 375 (Ind. 2005)
 - No consent
 - No warrant
 - Fatality
 - Defendant refused chemical test
 - Defendant did not consent to doctor drawing sample
 - Facts
 - Follows <u>Schmerber</u>, but also provides MORE protection by requiring that there be an accident

- Abney v. State continued
 - In Indiana, <u>Schmerber</u> requirements are the "outer limits" of acceptable police conduct
 - Also, Implied Consent laws do not limit state action to license suspension only
 - Remember, dissipation of alcohol in blood is only exigent circumstance if there is an accident too!

Schmerber Requirements

- Probable Cause Requirement:
 - No PC Cases:
 - Wiggins v. State, 817 N.E.2d 652 (Ind.App. 2004)
 - <u>Duncan v. State</u>, 799 N.E.2d 538 (Ind.App. 2003)
 - Schlesinger v. State, 811 N.E.2d 964 (Ind.App.2004)
 - Hannoy v. State, 789 N.E.2d 977 (Ind.App. 2003)
 - PC Case:
 - Frensemeier v. State, 849 N.E.2d 157 (Ind.App.2006)
 - Federal and State Constitutional Analysis
 - <u>Schmerber</u>

Schmerber Requirements

- Exigent Circumstances Requirement:
 - Justice v. State, 552 N.E.2d 844 (Ind.App. 1990)
 - Pre-dates Abney
 - Schmerber distinguished because no accident
 - Abney
- Reasonable Test Requirement
- Performed in a Reasonable Manner Requirement
 - Abney

Codification

- IC 9-30-6-6(g)
 - Officer requests sample
 - Officer certifies information in writing
 - Reasonable Force
 - Medically accepted manner

- Older line of cases held that (g) only applied if doctor would not assist
 - Robbins, 549 N.E.2d 1107 (1990)
 - Guy, 678 N.E.2d 1130 (1997)
 - Spriggs, 671 N.E.2d 470 (1996)
- Disapproved by <u>Abney</u>

Police Request vs. Medical Purposes

- Hannoy v. State, 793 N.E.2d 1109 (Ind.App. 2003)
- Stapleton v. State, 858 N.E.2d 694 (Ind.App. 2006) (NFP)

- Brown v. State, 774 N.E.2d 1001 (Ind.App. 2002)
 - First Appellate Review of Using Warrant after Refusal
 - Authorized
 - Drunks Drivers are not special
- Other States